Supreme Court, U.S.
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NO. 97-1530

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

MATTHEW G. BROWN,
Petitioner,

v.

SPECTACOR MANAGEMENT GROUP,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This is a simple, state law contract case which, despite Petitioner's selective and misstated references to the record and hyperbolic prose, does not merit review by this Court..

Matthew G. Brown, at all relevant times a citizen of New Jersey, is a former employee of Spectacor Management Group ("SMG"), a Pennsylvania joint venture (7a)[1]. Following the termination of his employment, SMG and Brown tried and failed to resolve various differences between them over severance benefits, bonuses, sales commissions and other issues. When Brown threatened suit, SMG sued first, seeking recovery of money it had advanced Brown and expenses it had incurred as a result of those advances, specifically including additional payroll tax liabilities, in a total amount of $50,708.25 (7a & 65a-66a). Brown answered this Complaint and asserted a compulsory counterclaim in the total amount of $1,060,665 (8a & 68a-77a).

Following discovery, both Brown and SMG moved for summary judgment. In addition, Brown filed a Rule 11 Motion, seeking sanctions against SMG for having forced him to bring his claims as compulsory counterclaims in federal court rather than waiting for him to file his own complaint in state court (from which, because SMG was a resident defendant, it would not have been removable). The basis for this latter motion was not that SMG had improperly counted its payroll tax liabilities in the

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[1]Citations styled "___a" refer to pages of the Appendix to the Petition for Writ of Certiorari.

amount in controversy, but rather the argument that certain undisputed sums owed Brown by SMG ought to be subtracted from the amount of SMG's claims against Brown in calculating the amount in controversy (110a-12a). The District Court denied all of these motions, the case was tried non-jury and the District Court found (a) in favor of SMG in the full amount of its $50,708.25 claim against Brown, (b) in favor of SMG on all of Brown's disputed contract claims and (c) in favor of Brown only as to those contract claims which SMG did not dispute (60a-61a). Brown appealed.

On appeal, the Third Circuit did not even grant oral argument on Brown's substantive claims or on his claim that the District Court lacked subject matter jurisdiction because the amount of Brown's undisputed claims had to be "netted" from the amount of SMG's claims in determining the amount in controversy. Rather, the Court of Appeals, on its own motion, raised, and called for oral argument, on the issue of whether SMG could properly include its enhanced payroll tax liabilities in the amount in controversy. Ultimately, the Court found it unnecessary to decide that issue, holding that, because it arose out of the same transaction or occurrence as SMG's claim, the amount of Brown's compulsory counterclaim constitutes part of the "amount in controversy" and, because Brown had asserted that counterclaim without first moving to dismiss for lack of subject matter jurisdiction, there was no unfairness in permitting it to be considered for jurisdictional purposes (8a-9a). While Senior Circuit Judge

Wellford, visiting from the Sixth Circuit, dissented, no active Circuit Judge of the Third Circuit voted for rehearing en banc (1a).

Brown now seeks discretionary review in this Court.

REASON FOR DENYING THE WRIT

A. The Decision of the Court of Appeals is Consistent in all Respects with the Prior Decisions of this Court and with the Decisions of the Other Courts of Appeal Which have Considered the Same Question and Raises no Issue of Substantial Importance to Federal Jurisdiction

This is a simple case in which neither the District Court nor the Court of Appeals did anything improper nor, for that matter, even unique. None of the considerations governing review on certiorari is present. Sup. Ct. R. 10.

1. The Decision of the Court of Appeals is Consistent With Section 1332(a) and the Prior Decisions of this Court.

While the Petition is somewhat difficult to parse, Brown's first argument appears to be that, in light of this Court's decision in St. Paul Mercury Indemnity Co. v. Red Cab. Co., 303 U.S. 283, 288-90 (1938), there are no circumstances under which a compulsory counterclaim may be considered in determining the amount in controversy for diversity jurisdiction purposes (Petition at 13-16). Neither the diversity jurisdiction statute, 28 U.S.C. § 1332(a), nor St. Paul says any such thing, either explicitly or by fair inference, and another decision of this Court at least suggests the contrary. Horton v. Liberty Mutual Insurance Co., 367 U.S. 348 (1961).

At the same time, two courts of appeals in addition to the Third Circuit have held squarely that compulsory counterclaims can be considered in determining the amount in controversy. Fenton v. Freedman, 748 F.2d 1358, 1359 (9th Cir. 1984); Motorists Mutual Insurance Co. v.

Simpson, 404 F.2d 511, 514 (7th Cir. 1969); Roberts Mining Co. v. Schrader, 95 F.2d 522, 523-24 (9th Cir. 1938).

Brown's rhetoric to the contrary notwithstanding, this is not a case of parties attempting to "confer subject matter jurisdiction by agreement". Under Section 1332(a), diversity jurisdiction exists where the "amount in controversy" is sufficient. 28 U.S.C. § 1332(a). Whether or not the portion of the controversy raised by the Plaintiff meets that threshold, by definition, claims which must be asserted as compulsory counterclaims under Rule 13 arise out of the same "controversy", Moore v. New York Cotton Exchange, 270 U.S. 593, 609-10 (1926); Fed. R. Civ. P. 13(a), and, analytically, nothing on the face of the statute precludes their inclusion in the jurisdictional amount once they are in the case. Once the counterclaim is asserted, there is no statutory reason why, and no suggestion in St. Paul that, it cannot provide the basis for diversity jurisdiction.[2]

In sum, this case does not present a conflict with any prior decision of this Court.

2. The Decision of the Court of Appeals is Consistent With the Decisions of the Other Courts of Appeals.

Having first apparently argued that Fenton, Simpson and Roberts were wrongly decided in light of St. Paul, Brown then goes on to embrace

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[2]What Brown also continues to ignore is that the District court found as a fact that SMG's claim against him exceeded $50,000, he has yet to point to a single case holding that SMG cannot recover it payroll tax liabilities (much less that its attempt to do so was in bad faith) and the Court of Appeals never reached this issue.

those decisions and argue that the Third Circuit's decision here is in conflict with them and that certiorari should be granted to resolve that conflict (Petition at 18-21). The basis for this purported conflict is Brown's contention that Fenton, Simpson and Roberts turned on the fact that the defendants there had filed their counterclaims without first objecting to jurisdiction while Brown raised lack of jurisdiction in his answer at the same time that he asserted his counterclaim. Brown misses the point. The essential distinguishing factor in Fenton, Simpson and Roberts was whether the defendant filed a Rule 12(b) motion challenging jurisdiction prior to asserting the counterclaim upon which jurisdiction could independently rest and not whether such a jurisdictional challenge had been made in the answer or otherwise. Nothing in Fenton, Simpson and Roberts, suggests that either the Seventh or Ninth Circuits would have reached a different result on the facts of the present case.

The Third Circuit's decision is not contrary to the decisions of the other courts of appeals and a grant of certiorari is not necessary to resolve any split in the circuits.

3. The Decision of the Court of Appeals is Consistent with the Federal Rules of Civil Procedure.

Finally, Brown argues that, insofar as it distinguished between challenging jurisdiction by way of a motion to dismiss and by way of affirmative defense in an answer, the Third Circuit has somehow violated Rule 12 of the Federal Rules of Civil Procedure, which he contends equates the two procedures (Petition at 16-18). Again, he simply misses

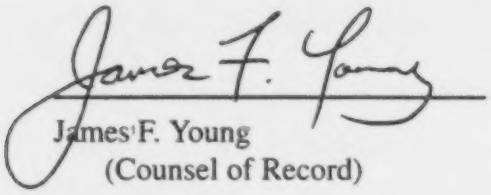
the point.

Certainly, Brown is correct when he says that Rule 12 permits various defenses, including both lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted, to be raised either by motion or by answer. Fed. R. Civ. P. 12. His error is in assuming the next step: That, regardless of when or how raised, the substantive result must be the same. Simple common sense tells us that is not so.

For example, if claimed federal question jurisdiction proves deficient, the question of whether the district court would then continue to exercise supplemental jurisdiction over state law claims in the same Complaint may be answered very differently depending upon the stage of the case and the resources invested to that point. See generally Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n.7 (1988); Rosado v. Wyman, 397 U.S. 397, 404-05 (1970). The fact that the federal rules provide more than one route to the same objective neither guarantees that each route will be equally successful nor frees counsel from the obligation to understand the potential consequences of his or her choice among these routes. Brown could have moved to dismiss and filed his own claims in state court. He elected not to do so. Rather, he chose to answer, assert his counterclaims, raise a jurisdictional defense in that answer and forego further litigation of the jurisdictional issue at that time. The Federal Rules of Civil Procedure do not protect parties from the consequences of their tactical decisions.

CONCLUSION

The questions presented in the Petition for Writ of Certiorari are both insubstantial and without merit. None of the considerations governing review by certiorari is present. The Petition should be denied.



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